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NO. 345

IN THE

Supreme Court of the United States

October Term, 1965

CLEM McCLELLAND, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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To The Honorable Supreme Court Of The United States:

NOW COMES Respondent, The State of Texas, and respectfully files this its brief in opposition to the Petition for Writ of Certiorari.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported as *McClelland v. State of Texas*, 389 S.W.2d 678.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under Title 28 U.S.C.A., Section 1257(3).

The Respondent denies that there is a substantial federal question presented for review by this Honorable Supreme Court.

QUESTIONS PRESENTED

The question presented is whether the State trial judge on hearing the motion to quash the indictment erred in refusing to permit the Petitioner to offer proof in his attempt to prove that the Grand Jury returning the indictment considered evidence that was alleged to have been illegally obtained?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provision relied upon by the Petitioner are the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, Article 1, Section 10 of the Constitution of the State of Texas, and Articles 886 and 887 of Vernon's Annotated Code of Criminal Procedure of the State of Texas.

STATEMENT OF THE CASE

The Respondent denies each and every allegation of fact stated and the unfounded inferences drawn by the petitioner in his petition except as the facts are supported by the record.

The petitioner was the former Probate Judge of Harris County, Texas. He was jointly indicted as a principal with

Jerry S. O'Brien, the administrator of the estate of Gordon Robert Von Stroh, for the offense of unlawfully converting money from the decedent's estate. After a severance was granted O'Brien was tried, sentenced to be confined for ten years in the penitentiary and is now serving that sentence, *O'Brien v. State,* 376 S.W.2d 833. The petitioner requested and was granted a change of venue. After receiving continuances the petitioner was not tried until almost two years following the date of his indictment. He was tried and convicted in Travis County, Texas, and was sentenced to serve a term of ten years in the State Penitentiary.

The facts relating to the commission of the offense as presented by the record are concisely and well stated by the Court of Criminal Appeals in their opinion and as stated will be adopted for the purposes of this Brief. This opinion is reported in 389 S.W.2d 678 and is appendix "A" of Petitioner's petition.

All felony cases in Texas must be prosecuted upon an indictment returned by a Grand Jury. Article 1, Section 10 of the Constitution of the State of Texas

Independent and separate from Grand Jury investigations the Texas Code of Criminal Procedure provides that a Magistrate may call witnesses in a Court of Inquiry to determine whether criminal offenses have been committed. Articles 886 and 887 of Vernon's Annotated Code of Criminal Procedure of the State of Texas.

In June 1962, a magistrate in Harris County, Texas, convened a Court of Inquiry to inquire into the suspected unlawful conduct in the processing of cases in the Probate Court. The Petitioner and other witnesses were subpoenaed

by the Magistrate. Petitioner and other witnesses appeared and testified without invoking their privilege against self-incrimination.

A subsequent Grand Jury investigation resulted in the return of a number of indictments for offering and accepting bribes, perjury, and conversion from various estates against the petitioner and several lawyers, appraisers and representatives of various estates.

The Petitioner only alleges and the record shows no more than that one member of the Grand Jury which returned the indictment attended the Court of Inquiry and that other members of the Grand Jury, as members of the public generally, were informed of the unlawful acts in the administration of the Probate Court by the news media coverage of the Court of Inquiry.

When the Petitioner was called for trial and before he was granted a severance and a change of venue he filed a motion to quash the indictment on the grounds that the Grand Jury, before returning the indictment, considered evidence obtained in the Court of Inquiry in which Court of Inquiry Petitioner had allegedly been deprived of constitutional rights.

ARGUMENT AND REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Petitioner has here alleged that he was deprived of constitutional rights because on his Motion to Quash the indictment, the trial court refused to permit him to show that the Grand Jury which returned the indictment considered evidence which was incompetent and illegally obtained. He alleged that the Grand Jury returning the

indictment had considered evidence obtained from a Court of Inquiry. He further alleged that the Petitioner was deprived of constitutional rights in the Court of Inquiry which rendered such evidence incompetent and illegal. His conclusion is that the Grand Jury considered the evidence obtained in the Court of Inquiry, which he alleges was incompetent and illegal, and therefore the resulting indictment is void.

The Petitioner does not allege that any of the testimony or evidence adduced and received at the Court of Inquiry was utilized in the trial of his case in Travis County, Texas. He does not even allege that any knowledge gained in the Court of Inquiry was so utilized.

Under Petitioner's allegations, just as was said by the Court in *Lawn v. U. S.*, 355 U.S. 339, 350, 78 S.Ct. 311, 318:

> "It should be unnecessary to say that we are not here dealing with the use of incompetent or illegal evidence in a trial on the merits, nor with the right to decline to give incriminating testimony in legal proceedings. . . ."

It is the State's position that even if the Petitioner's allegations were true that the Grand Jury did consider evidence adduced at the Court of Inquiry before returning the indictment against the defendant, that this would not render the indictment void.

In Texas, all felonies must be prosecuted on an indictment returned by a Grand Jury. Unlike most States, a felony cannot be prosecuted upon an information brought by the prosecuting officer. It has been long held in many

cases that an indictment will not be rendered void, regardless of what evidence the Grand Jury may or may not have considered before returning the indictment. *Crain v. State,* 14 Tex. 634; *Cotton v. State,* 43 Tex. 169; *Terry v. State,* 15 App. 66; *Jacobs v. State,* 35 Crim. 410, 34 S.W. 110; *Clark v. State,* 43 S.W. 522; *Choice v. State,* 54 Crim. 520, 114 S.W. 132; *Lee v. State,* 66 Crim. 567, 148 S.W. 567, 40 L.R.A. N.S. 1132; *Edwards v. State,* 73 Crim. 380, 166 S.W. 518; *Holliman v. State,* 108 Crim. 92, 299 S.W. 249; *Hyde v. State,* 123 Crim. 248, 58 S.W. 2d 533; *Barnes v. State,* 134 Crim. 461, 116 S.W.2d 408; *Morrison v. State,* 41 Tex. 516; *Dockery v. State,* 35 Crim. 489, 34 S.W. 281; *Chapman v. State,* 49 S.W. 587; *Buchanan v. State,* 41 Crim. 129, 52 S.W. 769.

It is respectfully urged that the rules of law applicable to the allegations here made by the Petitioner are those stated in: *Lawn v. United States,* 355 U.S. 339, 78 S.Ct. 311; *Costello v. United States,* 350 U.S. 359, 76 S.Ct. 406; *Beck v. Washington,* 369 U.S. 541, 82 S.Ct. 955 and *Holt v. United States,* 218 U.S. 245, 31 S.Ct. 2.

In *Lawn v. United States,* 355 U.S. 339, 349, 78 S.Ct. 311, 317, this Court followed and restated the language from the case of *Costello v. United States,* 350 U.S. 359, 363, 76 S.Ct. 406, 408, which reads as follows:

> "In Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 4, 54 L.Ed. 1021, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. Aside from the incompetent evidence 'there was very little evidence against the accused.' The Court refused to hold that such an indictment should be quashed, pointing out that 'The abuses of criminal practice would be en-

> hanced if indictments could be upset on such a ground.' 218 U.S. at page 248, 31 S.Ct. at page 4. The same thing is true where as here all the evidence before the grand jury was in the nature of 'hearsay'. If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

This Court, in the *Costello case* and reaffirmed by the *Lawn* case, refused to "establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence", saying:

> ". . . It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Costello v. United States,* 350 U.S. 359, 364, 76 S.Ct. 406, 409; and quoted in *Lawn v. United States,* 355 U.S. 339, 350; 78 S.Ct. 311, 318.

In discussing the identical issue here presented in the case of *Costello v. United States,* 350 U.S. 359, 362, 76 S.Ct. 406, 408, it was said:

> ". . . (N)either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so. And in 1852 Mr. Justice Nelson on circuit could say 'No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand

> jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof * * *.' United States v. Reed, 27 Fed. Cas. pages 727, 738, No. 16,134."

That the Petitioner's reliance upon the cases of *Coleman v. Alabama,* 377 U.S. 129, 84 S.Ct. 1152; *Carter v. Texas,* 177 U.S. 442, 20 S.Ct. 687; *State v. Branch,* 68 N. Car. 186 (2d Ed 68 N. Car. 133); *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417; *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758; *In Re Oliver,* 333 U.S. 257, 68 S.Ct. 499; *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623; *Pointer v. Texas,* 379 U.S. 815, 85 S.Ct. 1065; and *In re Groban,* 352 U.S. 330, 77 S.Ct. 510, is unfounded may be easily demonstrated.

In *Coleman v. Alabama,* 377 U.S. 129, 84 S.Ct. 1152, it was held to be improper to refuse to permit Coleman to offer evidence on his motion for new trial to support his claim that Negroes had been arbitrarily and systematically excluded from sitting on the Grand Jury which indicted him. In *Carter v. Texas,* 177 U.S. 442, 20 S.Ct. 687, it was held to be error where the defendant was not permitted to make proof on his motion to quash the indictment where the allegation, if proved, would have entitled him to have the indictment quashed. In the instant case if the allegations made by the Petitioner were all true he would not have been entitled to have the indictment quashed. Consequently he was not injured by the trial court's refusal to accept the proffered evidence. (The Petitioner was on the hearing of the motion to quash the indictment, permitted to offer but failed to prove his allegations that unauthorized persons were present during the time the Grand Jury deliberated.)

The early case of *State v. Branch,* 68 N. Car. 186, decided by the Supreme Court of North Carolina is easily distinguished from the facts here presented as was done by the Court of Criminal Appeals in their opinion affirming another case against this same Petitioner in which he was found guilty of the offense of accepting a bribe, *McClelland v. State,* 390 S.W.2d 777, 782, where the Court said:

> "In State v. Branch, 68 N. C. 186, cited by appellant, the witnesses upon whose testimony the indictment was presented were examined before the Grand Jury in open Court."
>
> "No such procedure or facts are presented in the case before us."

In *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, the trial court refused to grant a change of venue. Three members of the convicting jury had witnessed on television an "interview" soon after his arrest between Rideau and the Sheriff in which Rideau confessed to incriminating facts. The Petitioner McClelland was granted a change of venue from Harris County to Travis County, Texas, and his trial at his request, was long delayed. It is not even alleged in the case at bar that the jury trying the case on its merits had any knowledge of the Court of Inquiry.

In *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, Escobedo made a confession after having demanded and having been denied assistance of counsel. The confession was introduced into evidence upon his trial and was used to obtain his conviction. In the Petitioner McClelland's case, he has not even alleged (because he cannot) that any evidence that may have been obtained in the Court of Inquiry was introduced into evidence upon his trial in this case.

The cases of *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, and *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, were contempt cases which grew out of the one man Grand Jury system used in the State of Michigan. In the Petitioner McClelland's case, he alleges no connection between the Court of Inquiry and the trial of this case, other than the Grand Jury considered evidence adduced at the Court of Inquiry before returning the indictment.

In the very recent case of *Pointer v. Texas*, 379 U.S. 815, 85 S.Ct. 1065, it was held the use during his trial of a transcript of a witness' testimony at a preliminary hearing denied the defendant his right to confront and to cross-examine by counsel the witness against him, where he had not been represented by counsel at the preliminary hearing. In the Petitioner McClelland's case, it is not even alleged that the evidence gained in the Court of Inquiry was introduced upon his trial.

In the case of *In re Groban*, 352 U.S. 330, 77 S.Ct., 510, Groban had refused to testify in secret without counsel before the Ohio State Fire Marshall. Upon his refusal, he was imprisoned. The majority of the Court affirmed the lower court on the grounds he was not entitled to counsel during an investigative procedure. The Petitioner here relies upon, and quotes from the dissent. Actually, the dissent was on the grounds that "the judgment below should be reversed because it is contrary to due process of law to imprison appellant for refusing to testify before the Deputy Fire Marshall in secret". 352 U.S. 340. Here the Petitioner McClelland has complained not because an attempt was made to interrogate him in secret, but because his testimony at a public court of inquiry, where he did not invoke his privilege against self-incrimination, re-

sulted in too much publicity. Petitioner McClelland is not here, as Groban was, complaining of imprisonment because of his failure to answer questions at the Court of Inquiry.

Clearly, all of the cases relied upon by the Petitioner are not in point and may be distinguished from his case and the allegations he has made in support of his Petition.

Any complaint the Petitioner has regarding publicity he may have received due to the Court of Inquiry is answered by the fact that he was granted a change of venue from Harris County to Travis County, Texas, and upon his motions for continuance, there was a delay of almost two years between the Court of Inquiry and his trial upon this case.

The Petitioner does not now allege in his Petition, he did not allege in the Motion to Quash in the trial court, and he has never contended that the Grand Jury which returned the indictment was biased or prejudiced against him.

CONCLUSION AND PRAYER

In conclusion, the only allegation which the Petitioner makes is that his case should be reversed because of the failure of the trial court to permit him to show on the Motion to Quash the indictment that the Grand Jury considered illegal evidence before the indictment was returned. In view of *Lawn v. United States*, 355 U.S. 339, 78 S.Ct. 311; *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406; *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955; and *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2,

the law is clear that there is not a constitutional requirement that Grand Jury indictments be based upon legally competent evidence. The inescapable conclusion of Petitioner's argument, which is untenable, is that he was deprived of constitutional rights at a Court of Inquiry, and therefore, he may never be tried for any offense coming within the scope of the Court of Inquiry.

Wherefore, it is respectfully requested that this petition for certiorari to the Court of Criminal Appeals of Texas be denied.

Respectfully submitted,

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SERVICE

I, Carl E. F. Dally, Assistant District Attorney, Harris County, Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Respondent; I do further certify that a copy of the foregoing brief has been forwarded by United States Mail, First Class, postage prepaid, to Petitioner's Attorney, Mr. J. Edwin Smith, Scanlan Building, Houston 2, Texas, on this_____ day of August, 1965.

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